> would have surely violated §2 by doing precisely what the Court eventually blessed – reducing the concentration of a majority-African-American district in order to afford more electoral opportunity elsewhere in the map.

State Br. 92; see also Benkiser Br. 46 (suggesting that the fact a plan satisfies "the stringent requirements of Section 5" should dispose of Section 2 questions).

As just explained, the question whether a measure adopted to "afford *more electoral opportunity*" could violate Section 2 is not presented here – whereas Georgia's plan reflected a decision that "substantive * * * representation" was preferable to "descriptive," 539 U.S. at 483, the 2003 Texas plan "chose neither," J.S.App. 198a (Ward, J.). Indeed, the only § 2 challenge that *could have been raised* to the Georgia plan would have relied on arguments that *Appellees* here advance: that districts in which minority voters account for a nominal majority are different in kind for Voting Rights Act purposes from those where a smaller group can, in fact, elect candidates of their choice. And whether any particular plan "*violates* § 2" depends on a comprehensive appraisal of the circumstances; whatever "theory" a districting plan reflects, its validity depends on its *results*, *i.e.*, whether in fact, minority voters, have equal opportunity "to participate in the political process and to elect representatives of their choice,"42 U.S.C. 1973(b).

All of this aside, it is *Appellees*' reading of Section 2 – premised on the notion that it must be construed as permitting any plan that "complies with Section 5," Benkiser Br. 47 – that is breathtakingly "novel" and indeed contrary to precedent and plain statutory language. Consistent with the express terms of 42 U.S.C. 1973c and with the Department's recognition that preclearance does not mean that a practice "satisfies any other requirement of the law beyond that of section 5," 28 C.F.R. 51.49, this Court has held that a plan which "clearly violates" Section 2 may not be objected-to on that basis, *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), and that even a

purposefully discriminatory plan can "compl[y] with Section 5," see *Bossier Parish II*, 528 U.S. 320 (2000).

Indeed, the construction of Section 2 that Appellees declare beyond "belief" was the one *adopted* in *Gingles*, see 478 U.S. at 34 (invalidating districts in a plan that had been precleared). Not only does the absence of a Section 5 objection say nothing about violations of Section 2, but decisions not to interpose an objection require no reasons, let alone any specific finding of fact, and indeed can mean nothing more than that the 60-day time period has lapsed, see *Morris v. Gressette*, 432 U.S. 491 (1977). "Unlike court proceedings, administrative review under § 5 – which is by statute limited to 60 days upon receipt of all necessary information – does not * * * provide for the full presentation of evidence and rebuttal evidence by contesting parties and others interested in the proceedings." *Revision of Procedure for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 486, 487 (Jan. 6, 1987).

A rule that subjected plans to deferential review because they have been precleared would distort the Voting Rights Act in another basic way. Section 5 does not *confer* latitude; it is a limitation imposed, *in addition to* those imposed nationwide under Section 2, on certain jurisdictions, based on their longstanding history of denying electoral opportunity. See *City of Rome v. United States*, 446 U.S. 156 (1980). Making administrative preclearance preclusive would defeat the Section 2 rights of voters in the very jurisdictions where the legacy of racial discrimination in voting is greatest.

Finally, while *Georgia v. Ashcroft* did not "flatly reject[]," State Br. 93, *any* construction of *Section 2* – a provision that was not before the Court – that decision does nothing but undermine the construction urged by Appellees and imposed by the court below. The Court in *Ashcroft* (1) affirmed what was implicit in *Gingles* (and is undeniable as a matter of political reality and political science) – that a minority group's ability to elect candidates of choice does not depend on its constituting

50% (or any other fixed share) of district population, see *infra*; it (2) foreclosed the notion (accepted by the district court) that a "totality of the circumstances" analysis could ignore evidence of political influence; and it (3) extolled the virtues of coalition districts, contrary to the lower court's view that such districts – but not ones that are safely "packed" – are *properly* the "bull's eye" (J.S.App. 105a) for destruction in redistricting. See Opening Br. 32.[9]

If any case is an especially *unlikely* one to give greater-than-usual effect to the Justice Department's failure to object, this one would be it. The Section 5 conclusion was reached, despite a series of determinations by career professionals whose detailed analysis of the electoral data conflicts with central "factual" assertions advanced by Appellees here. Although we do not question the legal authority of the Department's political appointees to overrule its neutral analysts' recommendation, this case surely presents no reason for departing from the long-settled understanding of what Department preclearance means.

B. Actions That Intentionally Dismantle Districts Merit Different, Closer Scrutiny

As a more modest alternative to its assertion that challenges to the dismantling of an existing district are within the primary or exclusive jurisdiction of the Justice Department, the district

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[9] The Benkiser Appellees attempt (Br. 43) to "expose" plaintiffs as partisan, asserting that we maintain that "'submergence' of minority voters into majority-*Democrat* districts * * * *fulfills* the mandate of the Voting Rights Act, but placing precisely the same minority voters into a majority-*Republican* district is, *ipso facto*, a violation." Even as rhetoric, this sound-bite misses the mark: plaintiffs do not seek "submergence," but instead seek *to avoid* submergence in districts in which representatives are not – and do not need to be – responsive to their interests. What *Georgia v. Ashcroft* makes clear is that courts need not – and should not – ignore party identification in analyzing such questions. See also *Easley*, 532 U.S. at 245. As decades of case law attest, it makes no sense to address questions of electoral equality *without* recognizing the reality that Americans participate in the political process and elect candidates *through* political parties. See *Smith v. Allwright*, 321 U.S. 649, 656-66 (1944).

court held that a State's purposeful destruction of a district in which minorities have a demonstrated ability to control or influence electoral outcomes is no different under Section 2 than a claim challenging the failure ever to have drawn a district. See J.S. App. 110a n.114 ("If there is no obligation to create a * * * district, there is no obligation to retain" it).

But this weaker version of the rule is also at odds with Section 2's emphasis on the practical realities of the political process. The same reasons why Congress recognized that political participation is more difficult for groups that have long been fenced out show why destroying a district with a proven history of minority political success is far more damaging than is not creating a district in the first place. When an empowered minority community is splintered, the squandering of the "hard work" that has been invested in organizing and building bridges to other communities, see J.S.App. 196a (Ward, J.) (discussing testimony of Deralyn Davis); Ft. Worth NAACP Br. 3, is a circumstance deserving substantial weight in the Section 2 analysis.[10]

C. Appellees Fail to Offer Any Coherent Defense of A "50% Rule"

The State makes only a desultory effort to defend the "50% rule," largely suggesting (Br. 71-72) that the district court did not rely on it or that its finding can be upheld on alternate grounds. This surely understates the importance of the rule to the district court's analysis; indeed, the court's assumption that Plaintiffs could not satisfy the first *Gingles* prong (combined with its erroneous view that the District 24 claim "really" sounded in Section 5) helps explain why the decision's

[10]Challenges like this one are generally more straightforward, as they do not invite disagreements over which hypothetical "benchmark" is appropriate, see *Holder v. Hall*, 512 U.S. 874 (1994), and when mapmakers act against the background of a district's actual political behavior, courts have a more concrete basis for evaluating both their purposes and the likely effects for minority voters. See *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (en banc) (per curiam).

treatment of the other Section 2 issues is so cursory. See *infra*.

To the extent Appellees do mount a defense of the district court's legal rule, it falls flat. First, they attempt to make the task easier by misrepresenting what is at stake, repeatedly insisting that Plaintiffs – by arguing that Section 2 does not *exempt* claims based on empirical, rather than demographic, evidence of potential to elect – are asking the Court to announce a rule of Section 2 *liability*. Thus, Appellees argue that confirming that there is no 50% rule would "*require* the creation of districts where * * * *simply because* the minority-preferred candidate will usually win in that district, but usually lose in the * * * district created by the legislature" (emphasis added); mandate a remedy "regardless of whether the challenged district better complies with neutral districting criteria"; and mean that assigning minority voters to a "majority-*Republican* district is, *ipso facto*, a violation of the Act," Benkiser Br. 28, 30, 43.[11]

These assertions depend on a basic misreading of the statute. Rejecting the supposed 50% limitation does not change the terms on which courts impose liability, but rather confirms that where (as here) plaintiffs can establish ability to elect by means other than district population statistics (*and* establish the other two *Gingles* preconditions) a court is not foreclosed from considering the "totality of the circumstances." See *De Grandy*, 512 U.S. at 1011.[12]

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[11]The legal significance of the fact that a challenged district "better complies with neutral districting criteria" is not presented here; the plan *sacrificed* geographic compactness, respect for communities of interest, and other traditional principles in its single-minded pursuit of partisan gain. See, *e.g.*, JA 110, 178.

[12]Appellees step back from the rhetorical brink, conceding in a footnote (Benkiser Br. 37 n.28) that "the *Gingles* preconditions do not technically establish a Section 2 violation." But this is no technicality. See *De Grandy*, 512 U.S. at 1011 (*Gingles* "clearly declined to hold * * * that a court's examination of relevant circumstances was complete once the three factors were found to exist * * * * because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments

On the merits, Appellees' brief for a 50% requirement fails first – and most conspicuously – for the reason noted above: because Appellees' *defense of the 2003 plan* depends critically on the proposition they purport to deny: that African-American voters *can* elect candidates of choice, when they do not account for 50% or more of district CVAP. The many instances when the district court, Appellees, their expert witnesses, and their *amici* refer to districts that fail their test as "safe" or "majority-minority," do not reflect semantic imprecision, but instead a contradiction at the core of their position.

Thus, while Appellees cite *De Grandy*'s observation that "'[p]roportionality' * * * links the number of *majority-minority* voting districts to minority members' share of the relevant population" as supporting a 50% rule, Benkiser Br. 49 (citing 512 U.S. at 1014 n.11) (emphasis added by Appellees), they ignore the implication of their position: the 2003 plan provides African Americans, who account for 12.6% of Texas's citizen voters, *one* district out of 32 (CD30) where they account for a CVAP majority (50.6%). And a brief that affirmatively insists that creating a district with a 36.5% black VAP provides "descriptive representation," *i.e.*, ensuring that African-American voters will elect a (black) candidate of choice, shows the pointlessness of labored textual arguments that voters in districts below the 50% line cannot "elect" their preferred candidates. See JA 184-86 (State's expert's report, describing Districts 9, 18, and 30 as "African American district[s]" that will be "controlled by African American voters").

Second, the notion that the plain text of the statute recognizes some essential difference between districts above and below the 50% line can no longer be squared with controlling law.[13] Far beyond "*seem[ing] to suggest*" Benkiser

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resting on comprehensive, not limited, canvassing of relevant facts").

[13] Although Appellees are quite certain that the plain language of Section 2 supports their position, they are unable to settle precisely on *which* language makes that reading so plain. At various points, their brief italicizes "on account of *race*"; "*less* opportunity * * *"; "*to elect* representatives of

Br. n.25, that minority voters can "elect a candidate of their choice," in a district where they account for less than 50% of the population, *Georgia v. Ashcroft* unequivocally endorsed that proposition, see 539 U.S. at 481, and even the dissenting opinion, while arguing for a narrower interpretation of the right to "elect candidates of choice," rejected the notion that the 50% figure should be determinative, *id.* at 492, 498-99 (Souter, J., dissenting).

Indeed, as our opening brief explained (at 22-26), this recognition did not break new ground. Not only did Justice O'Connor make the point in so many words in her *Gingles* concurrence, 478 U.S. at 89 n.1, but *Justice Brennan's* opinion (478 U.S. at 59) contemplated that the "threshold" could be cleared in a case where minority voters' ability to elect was *dependent* upon "'Anglos who vote with them.'" State Br. 73 (quoting J.S.App. 111a). Because *Gingles* properly acknowledged that "cohesion" does not mean unanimity, cf. *Shaw v. Reno*, 509 U.S. 630, 647 (1993), black voters' ability to elect in a "50% district" would *necessarily* depend on a "coalition" of the "overwhelming majority" of minority voters and a reliable group of white voters. Thus, *Gingles* sanctioned claims by "persons joined, not by race, but by common view," J.S.App. 110a (describing statute as intended to exclude such claims) – and *Ashcroft* is even more explicit in doing so.

Efforts to extract a "policy" rationale for the "50% rule" cannot be squared with *Gingles* itself. If, the Court had viewed a 50% requirement as a "bulwark against an otherwise unbridled concept of minority voting rights," Benkiser Br. 38, it surely would not have expressly reserved the possibility of claims by *smaller* groups, 478 U.S. at 46 n.12 – a reservation reaffirmed repeatedly, see, *e.g.*, *Voinovich*, 502 U.S. at 154, including in circumstances where the "rule" could have been dispositive. See *De Grandy*, 512 U.S. at 1009. The "rule" is in fact inconsistent with the policy that *is* expressed in the

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their choice"; and "*den*[*ied*]." Benkiser Br. 32,33,33,33.

statutory text – that "judgments rest[] on comprehensive, not limited, canvassing of relevant facts," *id.* at 1011 – and it leads to results at odds with what this Court has identified as the Act's paramount object: "hasten[ing] the waning of racism in American politics," *id.* at 1020. See Opening Br. 30-36.

Finally, if there were any doubt as to the sense of Appellees' proffered construction, this surely would provide the acid test: on their "plain meaning" reading, black voters in Chicago did not "elect the candidate of their choice" in Harold Washington's watershed 1983 mayoral victory, because, despite intense racial polarization, he won with a tiny sliver of "crossover" support. See Opening Br. 30.

D. No District Court "Finding" Can Support the Judgment Below

1. "Anglo Democrat Control"

Appellees ask the Court to affirm the decision below based on the district court's "finding" that "Anglo Democrats control[led]" District 24. J.S. App. 111a-112a. If that offhand observation even counts as a "finding," it is clearly erroneous.

To begin with, because "Anglo Democrats" were, by all accounts, less numerous in the district than African-American Democrats, control, let alone "dominat[ion]," J.S.App. 111a, by that group would seem an especially unlikely conclusion. And the only evidence claimed to support the asserted "control" betrays a critical *legal* error: the assumption that a district "drawn by an Anglo Democrat, and for an Anglo Democrat," J.S.App. 111a, establishes control by Anglo Democratic *voters*.

Nor does the record support the assumption that the Anglo Democrat in question – Congressman Frost – was not the candidate of choice of the district's *African-American* voters. In the face of strong, consistent testimony that he *was*, see Opening Br. 37-39 – supported by objective evidence of a voting record that placed him literally at the top of the Texas delegation on issues of importance to the African-American community – the contrary argument boils down to one fact: that

he is an "Anglo." But "such an approach" is contrary to precedent, and "it would project a bleak, if not hopeless, view of our society – a view inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy," *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1016 (2d Cir.1995).[14]

Indeed, the premise that Frost was the candidate of Anglo Democrats is belied by the very evidence that Appellees trumpet. Attempting to show that "potential" voting must trump actual electoral behavior, the State (Br. 77) highlights that "14.5% of African-American voters turned out," to cast their votes for Congressman Frost in a Democratic primary, "while only * * * a scant 1.3% of Anglo voters did so." But surely the fact that African Americans turned out at a rate ten times as high to cast votes for Frost *refutes* the premise that Anglo Democrats were his "true base," while black support was somehow grudging.[15]

Finally, Appellees seek to prop up the court's "finding" with an *analogy* to former CD25, where former Representative Bell defeated a black opponent in 2002 – but was then defeated in a 2004 Democratic primary in a redrawn (and renumbered) district with an African-American VAP of 36.5%. That analogy might at least have intuitive force if it were advanced on behalf of plan that gave African-American voters in Tarrant County a *larger* numerical share of their district, but it hardly resonates in defending an arrangement in which they have been splintered

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[14] Even *Amicus* Wilson did not dispute that the votes that earned Frost exemplary marks from the NAACP involved issues of critical importance to African Americans.

[15] Nor does any *evidence* support speculation that this was a district where "'candidates favored by blacks can win, but only if the candidates are white.'" Benkiser Br. 27 (quoting *Jeffers v. Clinton*, 730 F. Supp. 196, 209 (E.D. Ark.1989)). On the contrary, although there was conflicting testimony as to whether an African-American challenger could unseat the popular Anglo *incumbent*, the testimony concerning what would happen if the seat were open was that African-American voters' preferred candidate – including a black candidate – would win. See JA 243.

to districts in which they are conceded to have no opportunity to elect or even influence election outcomes.

And neither Plaintiffs' case nor this Court's precedents permits the premise of this line of argument: that districts with similar demographic composition are interchangeable – *i.e.*, that Rep. Chris Bell can be treated as a proxy for Rep. Martin Frost (and Bell's defeated 2002 challenger, as a stand-in for the hypothetical African-American rival the court below believed Frost should have faced). See *Gingles*, 478 U.S. at 59 n.28 ("The inquiry into the existence of vote dilution * * * is district specific * * * * Courts must not rely on data" from other districts); cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (rejecting claim that court may "borrow" findings of discrimination from other jurisdictions).[16]

2. White Bloc Voting

Appellees also claim that the district court's judgment can be sustained based on its "conclu[sion]" that "the high crossover voting" failed to satisfy the third *Gingles* precondition. See State Br. 73. Whether the district court's observation is described as a "finding" or a "suggest[ion]," U.S. Br. 7, it, too, is factually and legally untenable.

As we explained (Opening Br.39 n.35), the district court's assertion rested on a plain legal error. Although the court described *Abrams v. Johnson*, 521 U.S. 74 (1997), as holding that a 30% "crossover rate * * * establish[es] the absence of Anglo bloc voting * * * as a matter of law," J.S. App. 111a & n.115, that decision announced no such rule of law. *De Grandy* (512 U.S. at 1011) described "bloc voting [as] a matter of degree, with a variable legal significance depending on other

[16] If numbers alone were critical, the 2004 result supports a very different inference from the one Appellees would impose: not only were voters accounting for "only" 36.5% of the district's VAP able to elect their preferred candidate, but the fact that their candidate won the primary by a *35% margin* only raises questions about the district court's (and Appellees') skepticism about CD24's African-American voters' ability to control the Democratic primary.

facts," and *Abrams* did not hold otherwise: it merely sustained a discrete district court finding. See 521 U.S. at 93; compare *Gingles*, 478 U.S. at 58, 81 (finding bloc voting, despite white crossover as high as 42%).[17]

But there are two further problems. First, the evidence here *did not establish* – as the State continues to argue – that the Anglo crossover rate in former District 24 averaged 30.75%. Rather, that figure ignores all general election contests and most primaries and it reflects the atypically high support that a single candidate, Dallas Mayor Ron Kirk, received from Anglo Democrats. *Appellees'* expert (State Ex. 1) found Anglo crossover in CD24 typically to be between 15% and 25%, exceeding 30% in only 2 of the 20 contests he examined.

Second, Appellees' arguments suffer from a fatal *legal* defect. Plaintiffs in this case do not contend that racially polarized voting denied them opportunity to elect candidates of choice in *former District 24*. The premise of the claim is that the districts to which they have been assigned under the 2003 plan afford no opportunity, *i.e.*, that their present inability to elect candidates was the result of the challenged practice. See *Voinovich*, 502 U.S. at 153 ("If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory"). Whether whites would vote as a bloc in the district a Section 2 plaintiff proposes as a *remedy* has no place in the *Gingles* inquiry. In these five districts, Appellees' expert confirmed, candidates preferred by black voters lost every election analyzed by double-digit margins, and in new District 26, where many of Fort Worth's black voters were placed, an average of 18% of Anglo voters supported the black-preferred candidate in general elections.

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[17] Although the State implicitly recognizes the district court's legal error, describing *Abrams* as "uph[olding] a district court's finding," State Br. 89, the Benkiser Appellees (Br. 44) make the surprising assertion that "the court below [was] correct[]" in recognizing that "this Court has held that crossover voting of between 22% and 38% is not racial bloc voting as a matter of law."

3. Political Cohesion

The district court "finding" (State Br. 73, 84) concerning black political cohesion makes the others just discussed appear to be models of judicial rigor. The only thing the decision below said about the second *Gingles* prong is this: "Nor is the cohesiveness of [District 24's] black voting age population clear." J.S. App. 112a. But once more, if it were a factual finding, this would be clearly erroneous.

Plaintiffs more than made the necessary showing, *i.e.*, that "a significant number of minority group members usually vote for the same candidates," *Gingles*, 478 U.S. at 56, in District 24. Indeed, the evidence here is indistinguishable from that in *Gingles*, where the fact that candidates enjoyed between 71% and 92% black support in 11 of 16 primaries and "between 87% and 96%" in general elections was held "clearly" to establish cohesion. 478 U.S. at 59. In CD24, African-American candidates in 2 of 3 primaries received 72% and 93% of the black vote, and in each of the 20 general elections analyzed by Appellees' expert, black voters cast well over 90% of their votes for the same candidate. State Ex. 1; see also JA 66, 72-77. Appellees' purported contrary demonstration requires not only disregarding the testimony of minority citizens and leaders who actually participate in the community's political life, but evaluating the statistics in ways *Gingles* expressly forbids: (1) ignoring general election results (compare 478 U.S. at 59); (2) treating 72% black support as only modest cohesion, compare State Br. 85 with 478 U.S. at 59 (describing 71% as "overwhelming"); and (3) treating a single, atypical election, in which the African-American vote divided, as fatal (compare *id.* at 59, discounting five such results).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully Submitted,

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No. 05-276

IN THE

Supreme Court of the United States

EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

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REPLY BRIEF OF THE JACKSON APPELLANTS

Appellees go to great lengths to portray the Texas Legislature's 2003 redistricting efforts as a laudable exercise in fostering good government and restoring democratic accountability. *See, e.g.*, State Br. at 18 ("This case is fundamentally about democracy."). That is nonsense. This was not some bipartisan effort to reallocate districts equitably. Orchestrated from Washington, it was one of the most notorious partisan power grabs in our history, designed to cement the narrow Republican majority in the U.S. House of Representatives. In pursuit of that goal, the Republicans in the Legislature fought tooth and nail, through months of parliamentary maneuvering, to replace a districting plan that was fair and lawful with one designed solely to maximize the number of Republicans that Texas would send to Congress.

Thus, far from being erroneous as appellees claim, the District Court's finding that the "single-minded purpose of the Texas Legislature . . . was to gain partisan advantage," J.S. App. 85a, was the only conclusion that the record could support. It follows that this abuse of governmental power was invalid under the Equal Protection Clause because it served no legitimate and rational public purpose. To allow such an illegitimate state action to stand would depart from our most cherished constitutional principles.

The Republican legislators pursuing their purely partisan agenda hesitated for months about how far they should go. But they ultimately decided to go for broke. Seeking to maximize their gains, they were willing (1) to eliminate one of only four districts where African-Americans had an opportunity to elect candidates of their choice and (2) to eliminate a Latino opportunity district and try to replace it with a "land bridge" district linking urban concentrations of Latinos in Austin and McAllen, 300 miles apart.

The bottom line is that upholding the 2003 Texas redistricting would give legislatures a green light to change district lines at will, whenever necessary to produce whatever electoral outcomes they favor. Far from promoting democracy, that result would subvert it, as voters are shifted from district to district and Representatives are chosen not "by the People of the several States," but by the politicians. U.S. CONST. art. I, § 2, cl. 1; *see People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1242-43 (Colo. 2003).

I. Texas Violated the First and Fourteenth Amendments by Enacting a Redistricting Law Solely to Benefit One Political Party at the Expense of Another.

Appellees devote many pages to trying to explain why it was constitutionally legitimate for the Legislature to redraw congressional districts for partisan reasons in 2003, just two years after lawmakers made no effort to draw a map and forced the courts to do so. But appellees' rationalizations fail because they ignore both the law and the undisputed facts.

1. Appellees' primary justification is the one suggested by the District Court in its opinion on remand — the notion that the 2003 plan sought to eliminate vestiges of the 1991 Legislature's supposedly pro-Democratic gerrymander that had made their way into the court's map 10 years later. State Br. at 41-45. That argument fails as a matter of law because it is just another way of saying that the Legislature did not like the partisan composition of Texas's congressional delegation and set out to use its control over district lines to defeat specific Representatives by breaking up the particular political communities where they enjoyed majority support.

Pure partisanship does not become a legitimate state interest just because the current delegation does not match the Legislature's assessment of the political leanings of

voters statewide. Legislators are not free to recalibrate the machinery of democracy whenever election outcomes strike them as "unbalanced." The Elections Clause delegates power to the state legislatures "'to issue procedural regulations,'" not "'to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.'" *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (citation omitted).[1]

Nor can purely partisan goals be repackaged as a response to the prior acts of political opponents. Such a defense is particularly inapt after *Vieth v. Jubelirer*, 541 U.S. 267 (2004), where the plurality cautioned that it is difficult to determine which party has "majority status" statewide and, more importantly, that it is folly to expect that candidates winning in separate winner-take-all districts will always reflect statewide trends. *Id.* at 288-90. For those reasons, it is absurd to call a districting plan a "gerrymander" just because, in a given year with one set of candidates, it produces results diverging from the perceived partisan balance statewide.

In any event, this "corrective partisanship" argument also fails as a matter of fact. As the District Court expressly found in 2004, the 2001 court-drawn map was not biased. J.S. App. 85a. To the contrary, it reflected the "strength of the Republican Party in Texas, with 20 of the 32 seats

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[1] Appellees invoke the Court's statement in *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength." State Br. at 45. But *Gaffney* does not stand for the proposition that achieving partisan balance can be the sole motive justifying an otherwise unnecessary mid-decade redistricting. Nor were the facts there remotely like those presented here, where the Legislature attempted to maximize Republican advantage at all costs.

offering a Republican advantage." *Id.* That means that in the 2002 election using that map, a large majority of the State's Representatives were elected in Republican-leaning districts.

The accusations in the District Court's 2005 opinion and in appellees' briefs that the court-drawn 2001 map was biased are premised on a single fact: The 2002 elections produced a congressional delegation with 17 Democrats and 15 Republicans. But as the District Court recognized in 2004, that occurred only because "voters in 2002 split their tickets" and "[s]ix incumbent Anglo Democrats were elected by narrow margins in Republican-leaning districts." *Id.* Despite that undeniable reality, the court a year later characterized its own map as "perpetuating" a prior Democratic gerrymander and accepted the notion that the 2003 map "dismantl[ed] a prior partisan gerrymander." *Id.* at 21a, 25a. That is just unfounded rhetoric. The Democrats who won in Republican-leaning districts did so because they were moderate-to-conservative incumbents who had earned their constituents' trust. They had been first elected years before, in mainly rural parts of the State that had never sent a Republican to Congress. And when they were narrowly reelected in 2002, it was not because some prior gerrymander, real or imagined, remained in place. It was because a majority of their constituents, who had gradually moved toward the Republican Party over the years, continued to want these lawmakers to represent them in Congress.

At trial, the State failed to put on a shred of evidence supporting the notion that the court's 2001 map was biased and required correction. To the contrary, appellees chose not to call to the stand their electoral expert, Professor Keith Gaddie. That no doubt was because he had testified in deposition that the 2001 map was fair or slightly favored the

Republicans, while the 2003 map was very biased. JA 189-93, 216, 224-25, 228-30.[2] The court, however, let *appellants* introduce Gaddie's expert report and deposition as exhibits. *Id.* at 173-230. So they became part of the trial record.

Although the record contained no evidence supporting claims of bias in the 2001 map, the District Court concocted its own "expert analysis," simplistically comparing the composition of the Texas delegation with the outcomes of statewide races. J.S. App. 42a. An *amicus* brief in this Court goes further, offering a completely untested and unverified "factual" analysis (complete with charts and graphs purporting to show that the 2001 court-drawn map was a "gerrymander") that the State chose not to submit to adversarial testing at trial. *See* Heslop Br. at 1a-23a.

But all these efforts are just fancy ways of saying that a delegation with 17 Democrats out of 32 does not reflect statewide voter preferences in Texas. Even assuming that is true, the results by themselves cannot show that the *map* is biased. Bias is reflected in the *opportunities* a map offers to each party, separate and apart from how particular candidates happen to do in a given year. Here, as the court found, the opportunities were there for the Republicans in 2002. J.S. App. 85a. But voters in six Republican-leaning districts chose to split their tickets and narrowly reelect Democrats.

Another way to show the flaws in labeling the 2001 plan a "gerrymander" based on the 2002 election results is to ask what would happen if that plan were reinstated. It is nearly

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[2] Gaddie agreed with appellants' expert, Professor John Alford, who testified that if votes statewide were divided 50-50, the 2001 map likely would have given the Republicans slightly more districts than the Democrats, while the 2003 map likely would have given the Republicans an 8- to 12-seat advantage. *See* JA 34-42, 48-55, 216, 229-30.

certain, with all the Republican incumbents elected in 2004, that elections using the 2001 map would now produce a majority-Republican delegation.[3] But that would not make the same court-drawn map a pro-*Republican* "gerrymander."

By contrast, the record leaves no doubt that the replacement map passed by the Legislature in 2003 was extremely biased and anticompetitive. The State's expert, Professor Gaddie, testified that the new map would give Republicans an advantage in 22 of 32 seats even if they were to receive only 52% of the vote statewide. JA 216, 229. And they would carry 20 of 32 seats even if the statewide vote split 50-50. *Id.* Moreover, as appellants' expert Professor Alford testified a year later, the map was remarkably successful in moving toward a 22-10 division of seats in its very first election, and the prospect for the rest of the decade is extremely noncompetitive elections in nearly every district, with incumbents winning by margins of 40% or more. J.S. App. 225a-226a. It is hard to imagine a clearer example of legislators deciding in advance of any voting how many seats should go to each party and where they should come from. Such rigging of elections is the antithesis of "restoring democratic accountability." State Br. at 19.

If the Court, on this record, were to hold that Texas's

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[3] A final flaw in the argument about vestiges of a prior gerrymander in the 2001 map is the fact that the District Court in 2001 specifically "eschewed an effort to treat old lines [from the 1990s maps] as an independent locator." J.S. App. 207a; *see* Jackson Br. at 4-5, 28. Instead, it emphasized neutral and traditional criteria like compactness and following local political boundaries. J.S. App. 207a-208a. The most that can be said is that the court created a separate district for each incumbent, regardless of party. *Id.* at 208a. That is not surprising, since a court is hardly going to pick and choose which incumbents to "pair" in one district. But avoiding needless pairings is a far cry from reproducing the prior map.

2003 plan served a legitimate governmental purpose because it restored partisan balance, it would be making legal and factual errors and giving *carte blanche* to legislators elsewhere to follow suit. For decades, our Nation has been well served by the tradition that lines should not be redrawn for political reasons in mid-decade. The Court should not stretch basic constitutional principles to bless the departure from that tradition that Texas saw fit to initiate in 2003.

2. Appellees also argue that a showing of purely partisan *motives* does not suffice to invalidate a redistricting law and that sufficiently severe *effects* also must be shown. State Br. at 36-41. That assertion lacks any basis in law or logic. Some consideration of politics is permissible when enacting a map that also serves legitimate governmental purposes. But the new map must, in fact, serve some legitimate governmental purpose to pass muster under the First and Fourteenth Amendments. A desire to replace Democrats with Republicans cannot provide the requisite justification.

Our claim does not depend on the proposition that such partisan legal classifications are inherently "invidious," *see* State Br. at 38 — although there are strong arguments to that effect. *See, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320, 1329-34, 1347-49 (N.D. Ga.) (invalidating a plan because otherwise-permissible population disparities systematically discriminated against one political party), *summarily aff'd*, 542 U.S. 947 (2004). Rather, we rely on the straightforward idea that securing partisan gain, standing alone, can never be a legitimate and rational basis for official action. *See id.* at 1338 ("The population deviations in the Georgia House and Senate Plans are not the result of an effort to further any legitimate, consistently applied state policy."). If the law were otherwise, there would be no basis for invalidating any state action favoring one political party over another — such as political litmus tests for civil-service hiring or for access to

public fora. Remarkably, in their 123-page brief, appellees never even mention the cases cited by appellants holding that state power may not be used solely to benefit a favored private interest or to harm a disfavored one — cases ranging from *Romer v. Evans*, 517 U.S. 620 (1996), to the political-patronage cases. *See* Jackson Br. at 18-21.

Where such single-minded intent exists, there is no need for a plaintiff to establish any particular *degree* of actual discriminatory effects. At least where, as here, there is no doubt that an intentional effort to redesign the electoral system to benefit one party had some effect (shifting six seats in Congress), the plaintiff has a right to redress.

3. Appellees' third response is to try to walk away from their concession and the District Court's finding that the *only* reason the Legislature acted in 2003 was to add as many Republicans to the State's congressional delegation as possible. *See* State Br. at 9-11, 33-35. They point to a list of more parochial political considerations that affected the location of particular lines once the decision to redraw the map was made. But nothing in the record even hints that the Legislature went through nearly a year of unparalleled wrangling, including three special sessions, for such trivial purposes as putting the city of Arlington into one district or keeping State Representative Lewis's district whole or uniting Parker and Wise Counties. As the District Court found, the *only* reason the Legislature acted at all was to engineer the replacement of targeted Democratic Congressmen with Republicans. J.S. App. 85a, 88a-89a.

Appellees claim that these findings did not mean what they said because they came when the court was rejecting charges of racial animus. State Br. at 28. But the court easily could have found that there was no racial animus without going on to say that the Legislature's actual motives